

At a regularly scheduled Authority Conference held on February 21, 2001, the Authority convened TRA Docket No. 01-00362 to explore whether competing local

exchange carriers ("CLECs") operating in Tennessee have nondiscriminatory access to BellSouth's Operations Support System ("OSS") as required by state and federal law. The focus of Docket No. 01-00362 is "to determine whether existing data or test results derived from OSS testing in other states is reliable and applicable to Tennessee and, in those instances where reliance on such testing is inappropriate, to conduct necessary testing."<sup>1</sup> In establishing this docket, the Directors unanimously voted to engage an independent, third party consultant to advise the Authority on the reliability of existing data or test results and to conduct any required testing. The Authority appointed Director H. Lynn Greer, Jr. to serve as the Pre-Hearing Officer.

On May 3, 2001, the Pre-Hearing Officer issued his First Report and Recommendation in TRA Docket No. 01-00362, setting forth a procedure for determining whether BellSouth's Tennessee systems and processes operate sufficiently to provide wholesale services and elements to CLECs without impeding competition. The Pre-Hearing Officer proposed to direct the independent consultant to prepare a report consisting of the following elements: (1) identification of the systems or processes used by BellSouth's Tennessee operations for providing services and network elements to competitors; (2) an audit of BellSouth's Tennessee performance data; and (3) recommendations regarding performance and system testing necessary for the Authority to ascertain whether BellSouth is providing network services and elements to CLECs in Tennessee without impeding competition. The Pre-Hearing Officer also recommended that, upon completion of the consultant's report, the Authority convene a Hearing for the

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<sup>1</sup> *In re Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems with State and Federal Regulations*, TRA Docket No. 01-00362 (Order Approving First Report and Recommendation of the Pre-Hearing Officer), pp. 2-3 (Released July 27, 2001).

purpose of receiving testimony and other evidence from the consultant and interested parties. The Pre-Hearing Officer proposed that, after the conclusion of the Hearing, the Authority render a decision on the consultant's recommendation and the necessity for actual testing of BellSouth's OSS in Tennessee. Under the Pre-Hearing Officer's proposal, any necessary testing would be conducted after the Hearing.

At a regularly scheduled Authority Conference on May 15, 2001, the Pre-Hearing Officer recommended that the Authority direct the selected independent, third party consultant to relate the testing in other states to the Tennessee systems and agreed that such a review would "verify the appropriateness, the independence and the accuracy of the testing so done."<sup>2</sup> The Pre-Hearing Officer then made a motion, contingent upon the Authority's approval of the First Report and Recommendation, that the Executive Secretary be authorized to select and retain a qualified consultant to prepare the report proposed in the First Report and Recommendation.

During the May 15<sup>th</sup> Authority Conference, the Directors voted unanimously to approve the First Report and Recommendation. In addition, the Directors voted unanimously to authorize the Executive Secretary to proceed expeditiously to select and retain a qualified consultant, subject to approval by the Authority.

After consultation with Authority staff, it was determined that only one consultant, KPMG Peat Marwick ("KPMG"), possessed the experience and expertise with BellSouth's OSS necessary to fulfill the TRA's stated requisites. After several meetings with and correspondence from representatives from KPMG, however, it became

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<sup>2</sup> *In re Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems with State and Federal Regulations*, TRA Docket No. 01-00362 (Transcript from May 15, 2001 Authority Conference), pp. 31-32.

clear that KPMG was unwilling to provide a report which would verify the appropriateness, the independence and the accuracy of the OSS testing performed in Florida and Georgia.

On August 15, 2001, the Executive Secretary filed a Status Report informing the Directors of his inability to retain an independent, third party consultant that would contract for the services requested by the Authority. At the Executive Secretary's request, this docket was placed on the August 21, 2001 Authority Conference agenda.

At the August 21<sup>st</sup> Authority Conference, the Directors deliberated upon the Executive Secretary's Status Report. A majority of the Directors determined not to engage a third party consultant, but to move forward with the Authority's own contested case. The same majority voted to amend those portions of the Pre-Hearing Officer's First Report and Recommendation which proposed to engage a third party consultant to participate in the first phase of this proceeding.<sup>3</sup>

After this decision, the Pre-Hearing Officer scheduled a Pre-Hearing Conference to establish, with the participation of the parties,<sup>4</sup> the issues and a Procedural Schedule. During this Pre-Hearing Conference, which was convened on September 6, 2001, the Pre-Hearing Officer informed the parties that the Procedural Schedule controlling this docket would encompass the following issues related to the evaluation of existing testing of BellSouth Telecommunications, Inc's ("BellSouth") Operations Support System ("OSS"): the regionality of the OSS, the reliability that the Authority should place on

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<sup>3</sup> Director Malone did not vote with the majority. *See* Transcript of August 21, 2001 Authority Conference, pp. 31, 48.

<sup>4</sup> The parties to this proceeding are BellSouth Telecommunications, Inc. ("BellSouth"), AT&T Communications of the South Central States, Inc., TCG MidSouth, Inc., Southeastern Competitive Carriers Association, Brooks Fiber Communications of Tennessee, Inc. and MCIMetro Access Transmission Services, LLC. These parties, with the exception of BellSouth, are Competing Local Exchange Carriers ("CLECs").

other states' OSS tests, and the extent to which commercial usage may substitute for testing. The Pre-Hearing Officer informed the parties that the case would be bifurcated into at least two phases, with Phase I addressing the regionality of BellSouth's OSS and Phase II addressing the reliability of OSS testing completed in other states. The Pre-Hearing Officer stated: "Our vision of the docket at this point is that there would be a two-phase hearing schedule. [In] Phase I there would be a set of Phase I issues. [As to] . . . those Phase I issues, we would have a hearing on the regionality of BellSouth's OSS. Phase II would be [the] reliability of other states' testing."<sup>5</sup> After considerable discussion, the issue of commercial usage was added to the issues. During the course of the September 6<sup>th</sup> Pre-Hearing Conference, the Pre-Hearing Officer reminded the parties that Phase I would address exclusively the regionality of BellSouth's OSS.<sup>6</sup>

At the September 6<sup>th</sup> Pre-Hearing Conference, the Pre-Hearing Officer also questioned BellSouth regarding the witnesses it intended to have available for cross-examination about third party OSS tests performed in other states, commenting:<sup>7</sup>

You've been in Tennessee. You have noticed that the Tennessee directors are very free to do their own cross-examination. I'm not sure that's as common in other states as it is here. I don't want to leave my colleagues in a position of having a deposition in front of them that raises more questions than it answers and us be unable to ask somebody a question about it. It gets back to the issue I brought up on the front end about putting your witnesses on in the logical order. In the most recent case, we ended up putting on rebuttal witnesses first and then we were unable to go back and ask questions after direct testimony was put on. I don't want to come in here with a stack of depositions this high [indicating] only to find out that we are not – the people who were deposed are not going to be available if necessary. Of course, under state law, we have more than one

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<sup>5</sup> *Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems with State and Federal Regulations*, TRA Docket No. 01-00362 (hereinafter *OSS Docket*) (Transcript of September 6, 2001 Pre-Hearing Conference).

<sup>6</sup> *See id.*, pp. 41-42.

<sup>7</sup> *See OSS Docket*, Transcript of September 6, 2001 Pre-Hearing Conference pp. 50, 52-56.

way to solve that problem, but would like not to have to exercise our subpoena power. I don't want it challenged. I don't want to have to use it. I would like for the parties to make it available.<sup>8</sup>

In his September 13, 2001 *Order Establishing Issues and Procedural Schedule*, the Pre-Hearing Officer reiterated that Phase I would address exclusively the regionality of BellSouth's OSS.<sup>9</sup> The September 13<sup>th</sup> *Order* stated that "the testimony offered during each Phase of the proceeding shall relate only to issues relevant to that Phase."<sup>10</sup>

The September 13<sup>th</sup> *Order* also established a list of issues. The issues were grouped to reflect the two Phases of this proceeding. The only questions related to commercial usage were listed as Phase II issues.<sup>11</sup>

As discovery progressed, numerous discovery disputes arose. A Pre-Hearing Conference was held on October 9, 2001 to resolve them. At that time, the Pre-Hearing Officer informed the parties as follows:

Let me put forth my dilemma, I'm sitting here as the [Pre-]Hearing Officer, and I've got to decide what gets before my colleagues and what doesn't and how much information we have and how much information we don't have. I'm sort of between a rock and a hard place because of the way this is being conducted. If you all will remember, I sat there and tried

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<sup>8</sup> *Id.*, pp. 56-57.

<sup>9</sup> See *OSS Docket, Order Establishing Issues and Procedural Schedule* (filed September 13, 2001) p. 7. One of the issues established stated:

For the inventory of processes, systems and procedures identified for BellSouth's Tennessee operations in Issue 1, compare such inventory with those processes, systems, and procedures that support BellSouth's wholesale operations in Georgia and Florida. Identify those Tennessee processes, systems and procedures that:

- a. Are the same, physically and functionally, as those used to support BellSouth's Florida operations.
- b. Differ from those used to support BellSouth's Florida operations. Explain in detail any differences.
- c. Are the same, physically and functionally, as those used to support BellSouth's Georgia operations.
- d. Differ from those used to support BellSouth's Georgia operations. Explain in detail any differences.
- e. Are significant to the development of competition in Tennessee?  
(Provide a matrix classifying each Tennessee process identified in Issue 1 into the categories identified above.)

<sup>10</sup> *Order Establishing Issues and Procedural Schedule*, p. 12.

<sup>11</sup> See *id.*, pp. 9-10.

my best to get a regionality report [conducted by an independent third party consultant] passed, and I could not get one passed and BellSouth did not support that position. You didn't support it. When you didn't support it, you then shift[ed] the burden right over here to say you are going -- the burden of proof clearly lies on your shoulders to prove it's a regional report. They [the CLECs] now have the burden to prove that it is not a regional report -- the system is not regional and that the reports may not be reliable, and those are going to come in two different phases. They [the CLECs] are now going to have to fill the responsibility that we initially asked KPMG to do but could not get the report done. And you [BellSouth] did not support that. So when you didn't support that and we didn't get the second vote for that, then they then have to step into KPMG's shoes. That's where I am. Now, without that information, I don't know how much I can limit them [the CLECs]. . .

Here's my next dilemma. . . . I cannot tell you how many times -- and you [BellSouth's counsel, Lisa Foshee] have not been to as many hearings here as some of the rest of them have, but I cannot tell you how many times I've had witnesses sit up here and we will ask that witness a question, and that witness will say, I'm not the person to ask that question. And we will say, "Who do we ask?" [And the response is,] "Well, they're not scheduled to appear here." Now, if I'm AT&T, I'm going to err on the side of asking for a long list of people to depose because they've been in that position just a few weeks ago on the Performance Standards and Measures [Hearing] where we did not have people available to answer the specific questions that either the Directors, our staff, or the cross-examiners ---the parties to the case, the intervenors had to ask. So I don't want to walk out of this hearing . . . [on] December 3d and say, "We've done it again." On December 7<sup>th</sup> we walk out here and we have --that's a good day to bomb out. On Pearl Harbor Day we bomb out because we've got witnesses who have sat here and were all looking [asking] . . ."Where was so and so?"<sup>12</sup>

The Pre-Hearing Officer further observed:

. . . Mr. Pate is one of the witnesses I am talking about that sat right here six weeks ago and said, "I can't answer that. You'll have to ask someone else." And the someone else was not listed as a witness and was not a party to the case. That's the problem we go through as Directors is that we sit here and we end up with a man that -- like Mr. Pate, who is a witness, who gets up here and says, "Well, I'm sort of the performance measures and OSS kind of PR man, but these people did the work and they're not here." And I go back to the same thing I've said, it's

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<sup>12</sup> *Oss Docket*, Transcript of October 9, 2001 Pre-Hearing Conference, pp. 40-41, 44-45.

BellSouth's responsibility to prove their case, and our frustration continues to be that sometimes witnesses are not available.<sup>13</sup>

During the October 9<sup>th</sup> Pre-Hearing Conference, the Pre-Hearing Officer reiterated that witnesses who were involved in the third party testing of BellSouth's OSS in other states be made available for questioning. He stated:

As it relates to KPMG and to Pricewaterhouse and Hewlett Packard, all of those people were under your [BellSouth's] contract. You better have them available. They [the CLECs] want to depose them. KPMG was hired by you [BellSouth] and is under direct contract with you and so was Pricewaterhouse and Hewlett Packard.<sup>14</sup>

Later in the Pre-Hearing Conference, the Pre-Hearing Officer specifically asked BellSouth to arrange for a witness from KPMG, the corporation that performed the Georgia third party tests, to be available at the Hearing,

BellSouth . . . [is] hanging their hat on the Georgia test. In Georgia, they [BellSouth] had a two-way contract that was approved by the Georgia Public Service Commission, but that contract was between BellSouth and KPMG.<sup>15</sup>

The Pre-Hearing Officer explained that that was the reason he continued to request counsel for BellSouth to produce that the witness who produced the test.<sup>16</sup> Notwithstanding the Pre-Hearing Officer's repeated comments, BellSouth's position on providing witnesses who participated in the testing from other states was that KPMG and Hewlett Packard are independently represented and that BellSouth did not intend to present a KPMG witness at the Hearing.<sup>17</sup>

During the October 9<sup>th</sup> Pre-Hearing Conference, the Pre-Hearing Officer granted the *Motion for Protective Order* filed by AT&T, TCG and SECCA on October 1, 2001.

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<sup>13</sup> *Id.*, pp. 69-70.

<sup>14</sup> *Id.*, pp. 46-47.

<sup>15</sup> *Id.*, pp. 110-111.

<sup>16</sup> *See id.*



The *Protective Order* states that all documents which a party claims are confidential “must be accompanied by proof of confidentiality, that is, an affidavit showing the cause of protection under this Order. The affidavit may be reviewed by the Pre-Hearing Officer . . . for compliance with this paragraph.”<sup>18</sup>

On October 17, 2001, the Pre-Hearing Officer issued the *Order Resolving Discovery Disputes*. Among other things, the *Order* directed BellSouth to “update the discovery responses from other states it filed in Tennessee where appropriate.”<sup>19</sup> The parties were also directed “to file a complete list of the witnesses that they intend to present at the Hearing . . .” in the order of their presentation.

On October 22, 2001, BellSouth filed the Direct Testimony of Milton McElroy, Jr., BellSouth’s Director of Interconnection Services. The stated purpose of his testimony is to “provide this Authority with information about the Georgia and Florida OSS testing conducted by KPMG, along with that of regionality testing conducted by Pricewaterhouse Coopers.”<sup>20</sup> KPMG’s Final Report on Georgia’s OSS and a Report and “Attestation” as to the Regionality of BellSouth’s OSS conducted by PWC at BellSouth’s request were made exhibits to Mr. McElroy’s Direct Testimony. Robert L. Lattimore, a PWC accountant, provided the two-page attestation of regionality.

On October 22, 2001, AT&T, and SECCA filed their *Motion for Summary Finding*. In the *Motion*, AT&T and SECCA allege that KPMG and HP have not complied with discovery. The *Motion* seeks a summary finding that that BellSouth cannot establish reliability without the participation of KPMG and HP in discovery

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<sup>17</sup> *Id.*, pp. 47, 73.

<sup>18</sup> *Protective Order*, pp. 1-2.

<sup>19</sup> *Order Resolving Discovery Disputes* (filed October 17, 2001) p. 10.

<sup>20</sup> Direct Testimony of Milton McElroy, Jr. (October 22, 2001) p. 2.

which, according to AT&T and SECCA, “is the functional equivalent of striking the third party tests.”<sup>21</sup> After this filing, the *OSS Docket* was listed on the agenda of the regularly scheduled Authority Conference on November 6, 2001.

During the regularly scheduled Authority Conference on October 23, 2001, after ascertaining that the parties were present, the Pre-Hearing Officer addressed the issue of the *Motion for Summary Finding*, inquiring whether BellSouth intended to respond. BellSouth sought an extension of time to respond. The Pre-Hearing Officer denied the request, stating:

As [Pre-]Hearing Officer, I’m not going to grant the motion . . . This is what we talked about from the very beginning, that we can’t have a bunch of delays. And I said everything I could to Ms. Foshee and Mr. McCallum [BellSouth counsel] from the very beginning, that these people were going to be offered the opportunity to be deposed and that they – you [BellSouth] needed to do everything you can to get KCI, KPMG, Hewlett Packard and the others to participate. They did it in Louisiana, they can do it here.<sup>22</sup>

At the October 23<sup>rd</sup> Authority Conference, the *Order Resolving Discovery Disputes* issued in this docket on October 19, 2001 was also discussed. During this discussion, questions regarding the discovery materials provided by BellSouth arose. These questions were addressed in the Pre-Hearing Officer’s *Order Amending and Clarifying Order Resolving Discovery Disputes*, which was issued on October 26, 2001.

The October 26<sup>th</sup> *Order Amending and Clarifying Order Resolving Discovery Disputes* directed BellSouth to “update the discovery responses from other states it files or has filed in Tennessee as material necessary for them to remain current becomes available.” The *Order* specifically defined the term “discovery responses” to include “all

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<sup>21</sup> *Reply to Response of BellSouth to Motion of AT&T and SECCA for Summary Finding* (filed November 1, 2001) p. 1.

<sup>22</sup> Transcript of the October 23, 2001 Authority Conference, p. 28.

written responses to discovery requests as well as all testimony, including deposition testimony and pre-filed testimony.” BellSouth was further ordered to file, “[i]n conjunction with all discovery responses from other states BellSouth files or has filed in this docket, . . . an affidavit attesting as to (1) whether the discovery response is current; (2) what, if anything, in the discovery response has been updated; (3) whether the discovery response is Tennessee-specific,<sup>23</sup> or otherwise relevant to Tennessee; and (4) if the discovery response is otherwise relevant to Tennessee, how is it so relevant.”<sup>24</sup>

On October 29, 2001, BellSouth filed its *Response of BellSouth to Motion of AT&T and SECCA for Summary Finding*, characterizing the *Motion* as a motion for partial summary judgment, rather than responding to AT&T and SECCA’s allegations about discovery abuses. In this *Response*, BellSouth described its *prima facie* case as follows: (1) commercial usage of BellSouth’s OSS; (2) BellSouth witness testimony describing the regional nature of BellSouth’s OSS; (3) a third party attestation of the regionality of BellSouth’s preordering and ordering systems; and (4) the Georgia Third Party Test (KPMG’s Final Report).

On November 2, 2001, AT&T and TCG filed *Procedural Motions of AT&T Communications of the South Central States, Inc. and TCG MidSouth, Inc.* This filing includes the following motions: (1) Motion to Strike Testimony that is beyond the scope of Phase I; (2) Motion to Revise the Procedural Schedule; (3) Motion to Strike the PriceWaterhouseCoopers (“PWC”) Attestation; (4) Motion to Compel PWC to submit affidavits substantiating their claims that documents produced during discovery qualify

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<sup>23</sup> The *Order* stated that “Tennessee-specific means that if the response had originally been submitted in Tennessee, it would have been identical.”

<sup>24</sup> *Order Amending and Clarifying Order Resolving Discovery Disputes* (filed October 26, 2001) pp. 2-3.

for confidential treatment; and (5) Motion to Compel BellSouth to fully respond to discovery requests.

In the Motion to Strike Testimony of BellSouth that is unrelated to Phase I, AT&T and TCG argue that BellSouth has violated that portion of the Pre-Hearing Officer's *Order Establishing Issues and Procedural Schedule* requiring that "the testimony offered during each Phase of the proceeding shall relate only to issues relevant to that Phase." AT&T and TCG argue that the vast majority of the pre-filed testimony submitted by BellSouth does not relate to regionality. On this ground, AT&T seeks to strike some or all of the pre-filed testimony and exhibits of Milton McElroy, Jr., Ronald Pate, Alphonzo Varner and Ken Ainsworth.

In the Motion to Strike the Attestation of regionality of BellSouth's OSS issued by PWC's Robert L. Lattimore, AT&T and TCG argue that BellSouth is attempting to deprive AT&T of its right, under Tenn. Code Ann. § 4-5-312, to conduct cross-examination, by refusing to make Robert Lattimore available for deposition. AT&T and TCG maintain that BellSouth is trying to bring in the PWC Attestation through the back door by attaching it as an exhibit to Mr. McElroy's direct testimony.

In the Motion to "Declassify" documents marked as proprietary by BellSouth and PWC, AT&T and TCS argue that BellSouth has not complied with that portion of the *Protective Order* which states that all documents that a party claims are confidential "must be accompanied by proof of confidentiality, that is, an affidavit showing the cause of protection under this [the Protective] Order." AT&T and TCG assert that BellSouth has marked many of the documents it has filed as confidential without providing the required affidavit. AT&T and TCG assert that PWC has marked all the documents it has

filed as confidential without providing an affidavit stating the reason for that designation. AT&T and TCG ask the Pre-Hearing Officer to require BellSouth and PWC to file the affidavits required by the Protective Order by a date certain.

In the Motion to Compel Complete Answers to specific discovery requests, AT&T and TCG list “many” of the deficiencies in BellSouth’s discovery responses in Attachment “A,” which includes 19 specific allegations of incompleteness or failure to respond. Among the specific allegations listed is Interrogatory No. 36, in which AT&T and TCG sought BellSouth’s flow-through data on a state specific basis.<sup>25</sup>

In the Motion to Revise the Procedural Schedule to Require BellSouth to file Rebuttal Testimony by November 13, 2001, AT&T and TCG argue that BellSouth should not be permitted to profit from its transgression of filing testimony unrelated to Phase I in Phase I by filing its direct case as rebuttal testimony. AT&T and TCG argue that, under the present schedule in which the parties have the same date for filing rebuttal, it will be denied the opportunity to rebut any direct testimony that BellSouth files as rebuttal.

On November 5, 2001, the Pre-Hearing Officer issued a *Notice of Pre-Hearing Conference* scheduled for November 6, 2001, immediately following the regularly scheduled Authority Conference. The *Notice* informed the parties that the purpose of the Pre-Hearing Conference was to hear argument on the pending motions. In addition, the *Notice* stated that the *Motion for Summary Finding* would be treated as a Motion to Compel Discovery pursuant to Tenn. R. Civ. P. 37.01.

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<sup>25</sup> AT&T’s Interrogatory 36 states:

From January 2001 to present, for each individual state in BellSouth’s region and for the BellSouth region in total, please identify the achieved flow through rate and the CLEC error excluded flow through rate, by interface (*i.e.*, LENS, TAG, EDI and all interfaces) for the following categories: a) LNP; b) UNE; c) Business Resale; d) Residence Resale; and e) Total (*i.e.*, UNE, Business Resale, and Residential Resale combined).

BellSouth responded that it “does not produce this data on flow through rates on a per state basis.”

In a letter dated November 5, 2001, BellSouth informed the Executive Secretary that it had been served with the *Procedural Motions* by regular mail on November 5, the same day it received the November 5<sup>th</sup> *Notice of Pre-Hearing Conference*. BellSouth stated its intent to respond to the *Procedural Motions* and explained that it was unable to do so on such short notice.

At the regularly scheduled Authority Conference on November 6, 2001, the Pre-Hearing Officer informed the parties that the Pre-Hearing Conference noticed for November 6 would be held on November 8 in order to hear oral argument on the pending motions.<sup>26</sup> The Pre-Hearing Officer then inquired as to the status of discovery. During the ensuing discussion, counsel for BellSouth stated that, “we would encourage and have encouraged KPMG to cooperate with respect to the Georgia test.”<sup>27</sup> The Pre-Hearing Officer then asked BellSouth, “But do you not intend to put Mr. Lattimore on the witness stand?” BellSouth responded, “No, sir, we don’t. We have a videotaped deposition of him that we are happy to put into evidence.” The Pre-Hearing Officer responded, “And I can’t cross-examine him?” BellSouth counsel then stated, “Well, if you have an issue with that, sir, then that may be something that I need to take back to my client. With respect to AT&T’s needing to cross-examine him, BellSouth’s position is that we will not make him available.”<sup>28</sup> During this discussion, the Pre-Hearing Officer again stated his desire that witnesses involved in the production of documents which BellSouth intends to offer into evidence must attend the Hearing and be subject to cross-examination. He

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<sup>26</sup> Counsel for BellSouth, AT&T, TCG and SECCA attended the Authority Conference.

<sup>27</sup> Transcript of the November 6, 2001 Authority Conference, p. 9.

<sup>28</sup> *Id.*, p. 12.

warned BellSouth that he was contemplating striking documentary evidence that was not so supported.<sup>29</sup> He then stated:

As my fellow Directors are aware, the Tennessee Court of Appeals 1997 *United Cities* decision holds that basic principles of fairness dictate that parties are afforded an opportunity to contest and rebut the facts or materials that form the basis . . . of any initial or final order issued by this Authority. . . My aim is to allow, within reason, the CLECs to conduct cross-examination and otherwise put on a case that, in conjunction with BellSouth's case, provides the Authority with as much relevant or current information as necessary for the Authority to make the best-informed decision possible within the time frames I have recommended. Therefore, at the close of discovery in this case, if it is shown my discovery orders have not been complied with, I will immediately issue an order striking the Georgia OSS test from the evidentiary record. My order will also strike any testimony that relies on material related to the Georgia OSS test. Striking the Georgia OSS test clearly comports, as it should, with the Tennessee legal precedent . . . Whether or not BellSouth wants to rely on KPMG's work is up to BellSouth.<sup>30</sup>

The Pre-Hearing Officer concluded his remarks with the following statement: "I would like to state further that as I have stated in [previous] Pre-Hearing Conferences . . . I want very much to have . . . representatives of KPMG, PriceWaterhouse, and Hewlett Packard testify in this case."<sup>31</sup>

On November 6, 2001, the Pre-Hearing Officer issued a *Re-Notice of Pre-Hearing Conference*, reminding the parties that the Pre-Hearing Conference was rescheduled for November 8, 2001.

#### **The November 8, 2001 Pre-Hearing Conference**

The parties in attendance at the November 8, 2001 Pre-Hearing Conference included:

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<sup>29</sup> *Id.*, p. 20.

<sup>30</sup> *Id.*, pp. 21-22.

<sup>31</sup> *Id.*, p. 22.

BellSouth Telecommunications, Inc. ("BellSouth") – **Guy M. Hicks, Esq.**, 333 Commerce Street, 22<sup>nd</sup> Floor, Nashville, TN 37201-3300 and **Lisa Foshee, Esq.**, 675 West Peach Street, Suite 4300, Atlanta, GA 30375, who participated telephonically;

AT&T Communications of the South Central States, Inc. ("AT&T") – **Michael A. Hopkins, Esq.**, McKenna & Cuneo, L.L.P., 1900 K Street, Washington, D.C. 20006 and **Jack Robinson, Jr., Esq.**, Gullett, Sanford, Robinson & Martin, PLLC, 230 Fourth Avenue, North, 3<sup>rd</sup> Floor, Nashville, TN 37219-8888.

Southeastern Competitive Carriers Association ("SECCA") – **Henry Walker, Esq.**, Boulton, Cummings, Conners & Berry, 414 Union Street, No. 1600, P.O. Box 198062, Nashville, TN 37219-8062.

The Pre-Hearing Officer made the following preliminary statement as he convened the November 8<sup>th</sup> Pre-Hearing Conference:

I hope you all clearly understood my comments at the Authority Conference regarding my concerns about due process in this proceeding: basic principles of fairness dictate that parties be afforded an opportunity to contest and rebut the facts or materials that inform any initial or final order issued by the Authority. The discovery I have ordered was aimed at providing the CLECs with the information necessary to conduct a meaningful cross-examination.

Let me further advise you that this Authority will strictly comply with *Consumer Advocate v. TRA and United Cities Gas Company, Inc.*, 1997 WL 92079, Tennessee Court of Appeals, March 5, 1997. The parties should review *United Cities Gas*. The following quote is of particular relevance:

It is elementary that administrative agencies are permitted to consider evidence which, in a court of law, would be excluded[,] under the liberal practice of administrative agencies. Almost any matter relevant to the pending issue may be considered, provided interested parties are given adequate notice of the matter to be considered and full opportunity to interrogate, cross-examine and impeach the source of information and to contradict the information.

This language, as it relates to this docket, means that documents with authors who are not subject to discovery and cross-examination at the Hearing will not be admitted into evidence.<sup>32</sup>

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<sup>32</sup> Transcript of the November 8, 2001 Pre-Hearing Conference, pp. 2-3.



After hearing argument regarding the need to cross-examine witnesses during the Hearing, the Pre-Hearing Officer reiterated that representatives of KPMG, PriceWaterhouse and Hewlett Packard be available testify at the Hearing and informed BellSouth that “if these reports are put into evidence, if the preparers of the reports are not here to testify on behalf of report that they prepared, they [the reports] will be stricken.”<sup>33</sup> The Pre-Hearing Officer explained why he wanted the non-party witnesses who prepared the reports at the Hearing:

A KPMG witness – the appropriate one . . . can tell me what was tested in Georgia versus what was tested in Florida . . . and I don’t have that information. I did not prepare that test. You did not prepare that test. Hewlett Packard prepared that test. There is no representative of Hewlett Packard available either. That is my concern . . . As it relates to the PriceWaterhouse report, Mr. McElroy is an employee of BellSouth. He can put that testimony in, and when I ask a question – [He’ll say] “Well, I saw the work papers. There on page so and so and so and so.” [When I ask] “How did you come to that conclusion?” . . . I know what the answer is. The answer is, “I don’t know. I didn’t prepare that.” [When I ask] “Who prepared it?” [he’ll say] “PriceWaterhouse.” [When I ask] “Well, is there a representative from PriceWaterhouse here?” [He’ll say] “We do not plan to put a representative of PriceWaterhouse on the witness stand.” And so his testimony becomes moot as far as I’m concerned . . . so that’s where I am, and that’s where this agency is. I have said almost from day one that if there is not a representative of those three companies available in this Hearing, then I’m going to strike the testimony . . . You [BellSouth] have submitted two reports, a Georgia report and a consultant’s report. In neither case are the preparers of those reports going to be available, nor is the preparer of the test going to be available . . . I cannot go behind those reports and ask the preparers any questions. I know what Mr. McElroy’s testimony is going to be. I can read it and once I get into cross-examination of those work papers, he can’t answer the questions, and I’ve been there before in these Hearings. I know where that cross-examination is going to go. That witness – the person who prepared the report, is not available, and that is unacceptable to this agency. That is going to be unacceptable to this agency. So I can’t make my position any clearer.<sup>34</sup>

Counsel for BellSouth then responded:

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<sup>33</sup> *Id.*, p. 12.

<sup>34</sup> *Id.*, pp. 14-17.

We can talk to our clients, and we can endeavor to bring Mr. Lattimore to the hearing, if that's what our client wants us to do. There is a chance that we can bring Mr. Weeks from KPMG, but I have no guarantee that we can do that, and I think it's highly unlikely that we will have a representative of Hewlett Packard there, but we will have to talk to our clients and see what evidence they feel is appropriate and whether we should get that done and whether it's necessary.<sup>35</sup>

The Pre-Hearing Officer then addressed the *Procedural Motions*, beginning with the Motion to Strike Testimony filed by BellSouth that is unrelated to Phase I. After summarizing the positions of AT&T and TCG, the Pre-Hearing Officer heard argument from BellSouth regarding, *inter alia*, how commercial usage was probative of all the issues in Phase I that deal with regionality.<sup>36</sup> After being directed by the Pre-Hearing Officer to examine the issues list in the September 13<sup>th</sup> Order, BellSouth acknowledged that commercial usage was a Phase II issue. AT&T then pointed out that BellSouth had not submitted a matrix of classifying each Tennessee process identified in Issue I into the categories specified in Issue I, which was required in the September 13<sup>th</sup> Order.<sup>37</sup> BellSouth responded that to do a summary matrix of what was done in a two-year, third party OSS test is a "ridiculous proposition."<sup>38</sup> The Pre-Hearing Officer then heard from AT&T and TCG regarding which BellSouth pre-filed testimony was beyond the scope of Phase I.

After considering the parties' argument, the Pre-Hearing Officer struck certain pre-filed testimony for specific witnesses in the following manner:

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<sup>35</sup> *Id.*, pp. 17-18; *see also* p. 68 (Later in the Pre-Hearing Conference, after ascertaining the Michael Weeks would be the appropriate witness from KPMG to testify about the Georgia Report, the Pre-Hearing Officer reiterated, "If Mr. Weeks is not available for cross-examination, the KPMG Report will be stricken. In his case, as the case with Mr. Lattimore, when the report is filed, and it has been filed, . . . it can serve as his testimony." ).

<sup>36</sup> *Id.*, p. 28.

<sup>37</sup> *See id.*, p. 32. (The relevant issue required by the September 13 Order is quoted at footnote 9).

<sup>38</sup> *Id.*

1. Ronald Pate. The Pre-Hearing Officer struck all of his testimony except pages 101 through 107 and 175 through 190.

2. Alphonzo Varner. The Pre-Hearing Officer struck his testimony in its entirety.

3. Milton McElroy, Jr. The Pre-Hearing Officer struck all his testimony with the exception of pages 102 through 114, and the Georgia test plan as it pertains to regionality. After further discussion, the Pre-Hearing Officer directed the parties to agree to a redacted version of his testimony and file it on November 13, 2001.<sup>39</sup>

Additional discussion took place regarding the testimony of David Scollard as to whether it was limited to Phase I issues. AT&T asserted that it had not received Mr. Scollard's testimony. It was decided that AT&T would notify the Pre-Hearing Officer of any objections to this testimony after conclusion of the Pre-Hearing Conference.

The Pre-Hearing Officer then ordered BellSouth to provide by November 13, 2001 a matrix as specified in the issues list included in the September 13<sup>th</sup> *Order Establishing Issues and Procedural Schedule* at page 9. In addition, the Pre-Hearing Officer ordered BellSouth to comply with the *Order Amending and Clarifying Order Resolving Discovery Disputes*, issued on October 26, 2001, which required BellSouth to file "[i]n conjunction with all discovery responses from other states BellSouth files or has filed in this docket, . . . an affidavit attesting as to (1) whether the discovery response is current; (2) what, if anything, in the discovery response has been updated; (3) whether the discovery response is Tennessee-specific,<sup>40</sup> or otherwise relevant to Tennessee; and (4) if the discovery response is otherwise relevant to Tennessee, how is it so relevant." The

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<sup>39</sup> *Id.*, pp. 84-85.

<sup>40</sup> The *Order* stated that "Tennessee-specific means that if the response had originally been submitted in Tennessee, it would have been identical."

Pre-Hearing Officer ordered BellSouth to comply with this mandate by November 13, 2001.

The Pre-Hearing Officer then addressed the Motion to Strike PWC Attestation. After hearing argument from BellSouth, the Pre-Hearing Officer informed the parties that the PWC Report and Mr. Lattimore's Attestation would not be admitted unless Mr. Lattimore was available to testify at the Hearing.<sup>41</sup>

The Pre-Hearing Officer then addressed the Motions to Compel specific discovery requests. The parties announced that they had agreed upon a plan to resolve most of their disputes as to AT&T's discovery requests. The only matter that remained in dispute was Interrogatory No. 36, in which AT&T asked for flow-through rates for each state in BellSouth's region. During the Pre-Hearing Conference, AT&T asserted that a KPMG witness who did the flow-through evaluation in Georgia had testified that BellSouth had the capability to provide state-specific flow-through reports and, according to AT&T, that BellSouth's flow-through reports are a computer program that runs on a database which has flags in it to identify the state referenced.<sup>42</sup> AT&T explained that this information would either confirm or contradict the claim that BellSouth's ordering systems perform substantially the same from state to state for flow-through purposes.<sup>43</sup> BellSouth responded that it did not produce flow-through reports on a state by state basis and was unsure whether it could.<sup>44</sup> After hearing considerable argument, the Pre-Hearing Officer directed BellSouth to either produce the requested data or explain in writing why

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<sup>41</sup> *Oss Docket*, Transcript from November 8, 2001 Pre-Hearing Conference, p. 50.

<sup>42</sup> *Id.*, p. 54.

<sup>43</sup> *Id.*, p. 56.

<sup>44</sup> *Id.*, pp. 54, 57.

producing such data is not technically feasible. BellSouth was ordered to comply with this directive by November 13, 2001.<sup>45</sup>

The Pre-Hearing Officer then turned to the Motion to “Declassify” Documents Marked as Proprietary. After ascertaining that BellSouth had not complied with the *Protective Order* by failing to file the affidavits explaining why the documents filed as proprietary should be classified as proprietary, the Pre-Hearing Officer ordered BellSouth to file the affidavits by November 13, 2001.<sup>46</sup>

The Pre-Hearing Officer then addressed the Motion to Revise the Procedural Schedule. The Motion requested that the Pre-Hearing Officer require BellSouth to file its Rebuttal Testimony by November 13, 2001 rather than on November 20, 2001, as contemplated by the Procedural Schedule. The Pre-Hearing Officer determined to hold the Motion in abeyance.<sup>47</sup>

After reaffirming his decision to strike the reports and the PWC Attestation if witnesses who participated in their creation were not available for cross-examination, the Pre-Hearing Officer determined to hold the *Motion for Summary Finding* in abeyance.<sup>48</sup>

### **Subsequent Filings**

On November 9, 2001, BellSouth filed its List of Witnesses. The following individuals were listed: (1) Ronald Pate; (2) Milton McElroy; (3) Kenneth Ainsworth; (4) Alfred Heartley; and (5) David Scollard. BellSouth further stated that it had informed Mr. Lattimore of PWC and Mr. Weeks of KPMG of the Pre-Hearing Officer’s decision to

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<sup>45</sup> *Id.*, p. 63.

<sup>46</sup> *Id.*, p. 76.

<sup>47</sup> *Id.*, p. 80.

<sup>48</sup> *Id.*, p. 85.

strike their testimony unless they were available for cross-examination at the Hearing and it had requested them and a representative of Hewlett Packard to appear at the Hearing.

On November 13, 2001, AT&T filed a *Motion for Tami Azorsky to Appear Pro Hac Vice*. The *Motion* filed on behalf of Ms. Azorsky indicates that she is licensed and in good standing in the District of Columbia and that no disciplinary action or investigation is pending against her.<sup>49</sup> Ms. Azorsky agrees to subject herself to the jurisdiction of the Authority in any manner arising out of her conduct in such proceedings and agrees to be bound by the rules governing the conduct of attorneys appearing before the Authority.<sup>50</sup> The *Motion* complies with Rule 19, Rules of the Tennessee Supreme Court and Tenn. Comp. R. & Reg. 1220-1-2-.04(7) and is hereby granted.

On November 13, 2001, BellSouth filed affidavits attesting that the discovery responses BellSouth filed in this docket are current, Tennessee-specific or otherwise relevant to Tennessee. BellSouth also filed Matrices purporting to satisfy the requirements in the issues list included in the September 13<sup>th</sup> *Order Establishing Issues and Procedural Schedule*.

#### **BellSouth's Failure to Respond to Discovery**

At the November 8 Pre-Hearing Conference, BellSouth was ordered to file by November 13, 2001 a Response to AT&T Interrogatory 36 or an explanation describing why such a Response is not technically feasible. BellSouth failed to make such a filing. BellSouth also failed to file by November 13, 2001 affidavits explaining why the documents it filed as proprietary should be classified as proprietary, notwithstanding being ordered by the Pre-Hearing Officer to do so. In addition, BellSouth did not file the

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<sup>49</sup> See Rule 19, Rules of the Tennessee Supreme Court.

<sup>50</sup> See *id.*

redacted pre-filed testimony of Milton McElroy by November 13, 2001 as required by the Pre-Hearing Officer.

Throughout this proceeding, the Directors' desire to obtain an objective view of BellSouth's OSS has been abundantly clear. This was the obvious goal underlying the Authority's decision to retain an independent, third party consultant to examine BellSouth's OSS. When the Authority was unable to retain such a consultant, the Pre-Hearing Officer informed the parties that the CLECs would have to stand in the third party consultant's shoes and assist the Directors in their goal of obtaining an objective view of BellSouth's OSS.

The record of this proceeding is replete with examples of BellSouth's continuing aversion to this process. BellSouth has ignored orders requiring it to file affidavits attesting to whether discovery documentation it has filed is current and Tennessee-specific. BellSouth has only partially complied with the CLECs' discovery requests. BellSouth failed to file the matrix required in the September 13<sup>th</sup> *Order Establishing Issues and Procedural Schedule*. BellSouth ignored the language in the September 13<sup>th</sup> *Order Establishing Issues and Procedural Schedule* requiring that "the testimony offered during each Phase of the proceeding . . . relate only to issues relevant to that Phase."<sup>51</sup> BellSouth has ignored the requirement in the *Protective Order* and the Pre-Hearing Officer's specific order that it file affidavits attesting to the need for protection. BellSouth has also ignored the Pre-Hearing Officer's orders to file, by November 13, (1) an Answer to AT&T Interrogatory 36 or an explanation describing why such an Answer is not technically feasible; and (2) the redacted testimony of Milton McElroy, Jr.

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<sup>51</sup> OSS Docket, *Order Establishing Issues and Procedural Schedule*, p. 12.

Most significantly, BellSouth turned a deaf ear to the Pre-Hearing Officer's repeated directives that BellSouth make available for cross-examination at the Hearing the third party witnesses who prepared the two Reports for BellSouth and the PWC Attestation BellSouth which seeks to place into evidence in this proceeding.<sup>52</sup> The Pre-Hearing Officer raised this issue with BellSouth on September 6, October 9, October 23, November 6 and November 8. It is clear from BellSouth's statements on November 6 that BellSouth had made no effort to comply with the Pre-Hearing Officer's orders. The noticeable absence of the third party witnesses on BellSouth's witness list further confirms this conclusion. BellSouth's actions demonstrate its lack of good faith and its unwillingness to assist the Authority in resolving the issues in this docket.

After further consideration and review of the record, including the witness list filed by BellSouth, the Pre-Hearing Officer hereby strikes the Report on Georgia's OSS completed by KPMG and the PWC Report and Attestation and BellSouth is prohibited from presenting evidence concerning these Reports during the Hearing. This decision is compelled by considerations of fairness and the *United Cities* case.

Having considered the totality of BellSouth's actions in this docket, BellSouth is hereby ordered to provide the state-specific flow-through data requested by AT&T no later than **Tuesday, November 20, 2001**. It must be assumed that BellSouth's failure to timely file an explanation regarding its inability to provide the state-specific flow-through data requested in AT&T's Interrogatory 36 indicates its lack of objection to providing the requested data. Without a state specific flow-through report, it is impossible to determine

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<sup>52</sup> During the November 8<sup>th</sup> Pre-Hearing Conference, BellSouth asserted that the Pre-Hearing Officer had previously stated that this was BellSouth's case to try as it saw fit. Transcript of November 8, 2001 Pre-Hearing Conference, p. 16. Nothing in this *Order* prevents BellSouth from presenting its case, so long as BellSouth complies with the requisites of due process.



if the performance from one or more states provides performance at a level sufficient to make up for any state that may not be performing well enough to meet satisfactory standards. This is particularly important when one considers the controversy surrounding Direct Order Entry (DOE) and Service Order Negotiation System (SONGS). According to BellSouth these systems have no material difference in functionality or reporting. This information could prove important in determining the regionality of BellSouth's OSS.

In addition, BellSouth produces state-specific reports on firm order confirmation ("FOC") timeliness and rejection notice timeliness which are further broken down into totally mechanized, partially mechanized and manual. This further confirms that BellSouth has the state specific flow through information requested by AT&T. However, there is no indication either by AT&T or in BellSouth's publicly available *Monthly State Summary* of its wholesale performance that such flow through information is available or can be generated by the type of interface as requested by AT&T. Therefore, BellSouth is only required to provide the requested information by category but not broken down by the type of interface.

After reviewing the testimony of David Scollard, the Pre-Hearing Officer finds that it addresses issues beyond the scope of Phase I. The Pre-Hearing Officer directs BellSouth to file, no later than **Monday, November 19, 2001**, redacted Direct Testimony of the following witnesses: (1) Ronald Pate; and (2) David Scollard. The redaction shall reflect the Pre-Hearing Officer's rulings during the November 8, 2001 Pre-Hearing Conference. The redacted Direct Testimony shall address only Phase I issues related to the regionality of BellSouth's OSS. Redaction will promote the orderly presentation of evidence at the Hearing.

**IT IS THEREFORE ORDERED THAT:**

1. On the grounds set forth in this Order, the Report on Georgia's OSS completed by KPMG and the PWC Report and Attestation are stricken from the evidence in this proceeding.

2. AT&T and TCG's Motion to Strike Testimony Beyond the Scope of Phase I is granted in part and denied in part as follows:

a. The Pre-filed Direct Testimony of Ronald Pate is stricken, with the exception of pages 101 through 107 and 175 through 190. BellSouth is directed to file a redacted version of this Testimony no later than **Monday, November 19, 2001.**

b. The Pre-filed Direct Testimony of Alphonzo Varner is stricken in its entirety.

c. BellSouth is directed to redact the Direct Testimony of David Scollard by removing all statements that are beyond the scope of the Phase I issues listed in the September 13 *Order Establishing Issues and Procedural Schedule* no later than **Monday, November 19, 2001.**

d. The parties are ordered to file the redacted Direct Testimony of Milton McElroy by **Tuesday, November 13, 2001.**<sup>53</sup>

3. BellSouth is ordered to file a matrix as specified in the issues list included in the September 13<sup>th</sup> *Order Establishing Issues and Procedural Schedule* no later than **Tuesday, November 13, 2001.**


4. BellSouth is ordered to file no later than **Tuesday, November 13, 2001** affidavits complying with the *Order Amending and Clarifying Order Resolving Discovery Disputes*, issued on October 26, 2001, which required BellSouth to file “[i]n conjunction with all discovery responses from other states BellSouth files or has filed in this docket, . . . an affidavit attesting as to (1) whether the discovery response is current; (2) what, if anything, in the discovery response has been updated; (3) whether the discovery response is Tennessee-specific, or otherwise relevant to Tennessee; and (4) if the discovery response is otherwise relevant to Tennessee, how is it so relevant.”
5. BellSouth is ordered to file no later than **Tuesday, November 13, 2001** affidavits explaining why the documents it filed as proprietary should be classified as proprietary as required under the *Protective Order*.<sup>54</sup>
5. The Motion to Strike PWC Attestation filed by AT&T and TCG is dismissed as moot.
6. The Motion to Compel Discovery filed by AT&T and TCG is granted in part as to Interrogatory 36. BellSouth is ordered to provide no later than **Tuesday, November 20, 2001** the achieved flow-through rate and the CLEC error excluded flow-through rate for each individual state in BellSouth’s region and for the BellSouth region in total for the following categories: a) LNP; b) UNE; c) Business Resale; d) Residential Resale; and e) Total (*i.e.*, UNE, Business Resale, and Residential Resale combined).
7. The motion to Revise Procedural Schedule is held in abeyance.
8. The *Motion for Summary Finding* is held in abeyance.

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<sup>53</sup> See *infra*, p. 22 (discussing the failure to timely comply with this order).

<sup>54</sup> See *infra*, p. 22 (discussing BellSouth’s failure to timely comply with this order).

9. AT&T's *Motion for Tami Azorsky to Appear Pro Hac Vice* is granted.



Director H. Lynn Greer, Jr.  
Pre-Hearing Officer



K. David Waddell, Executive Secretary